



Date: OCT 25 1991

Case No.: 89-INA-269

In the Matter of

HUMAN PERFORMANCE MEASUREMENT, INC.
Employer

on Behalf of

TONY WAH-TUNG WONG
Alien

Before: Brenner, Glennon, Guill, Groner, Litt,
Romano, Silverman and Williams
Administrative Law Judges

AARON SILVERMAN
Administrative Law Judge

DECISION AND ORDER

This is an administrative-judicial review of a United States Department of Labor Certifying Officer's denial of an application for labor certification for permanent employment of an alien in the United States arising under the Immigration and Nationality Act (Act).¹ Review of the denial is based on the record upon which it was made, together with the request for review, as contained in the Appeal File (AF) and written arguments of the parties. See §656.27(c).

Under Section 212(a)(5)(A), an alien seeking to enter the United States to perform skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has certified to the Secretary of State and the Attorney General that (1) there are insufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.²

¹ 8 U.S.C. §1101 et seq.

² 8 U.S.C. §1182(a)(5)(A). Prior to recodification by the Immigration Act of 1990, this section was located at section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C.
(continued...)

Regulations promulgated by the Secretary of Labor relating to the processing of labor certification applications are set forth at 20 C.F.R. §656 et seq. An employer who intends to employ an alien permanently must submit, as part of its application, documentation which clearly meets the requirements of §656.21. Full compliance with those requirements is the minimum necessary to show that an employer has by reasonable means made a good faith effort to test the availability of, and recruit qualified U.S. workers who are willing to work at the prevailing wages and working conditions of the job opportunity.

STATEMENT OF THE CASE

On December 15, 1988, Human Performance Measurement, Inc. (HPM), the Employer, located in Arlington, Texas, applied to certify Tony Wah-Tung Wong, the Alien, for permanent employment as a human performance engineer working from 9:30 a.m. to 6:30 p.m., forty hours per week at the rate of \$13.83 per hour.

A Master's degree in electrical engineering with six months experience in the job or a related occupation was required to perform the following duties:

- Design and develop proprietary human performance measuring devices;
- Design, implement, maintain and upgrade hardware and software (Assembly and "C" languages for special purpose Intel 8051 family microcontroller boards);
- Develop interfaces between proprietary human performance measuring devices and IBM personal computer (or compatibles) by both hardware and software techniques;
- Develop interactive software for the IBM personal computer environment to allow the customer/clinician to perform automatic measurements, data recording and displays with HPM instrumentation;
- Develop and implement a proprietary database management system in accordance with Human Performance Theory principles and practices. (AF 88).

On February 15, 1989, the Certifying Officer (CO) issued a Notice of Findings (NOF) citing §656.20(c)(8) which requires that the application for certification must clearly show that the job opportunity is open to any qualified U.S. worker, and §656.50 which defines employment as work by an employee for an employer other than oneself. The CO noted that for the purposes of that definition an investor is not an employee and indicated that a bona fide employer/employee relationship did not appear to exist.

²(...continued)
§1182(a)(14).

Accordingly, the CO spelled out the information that the Employer was to submit before the issuance of a final determination concerning its incorporation, officers, shareholders and operations. In addition, the Employer was to state the basis for, and submit, any data or information to support its contention that a bona fide employee/employer relationship and job opening exist. (AF 43-44).

The Employer duly responded on March 21, 1989. (AF 9-41). In the Final Determination issued April 28, 1989, the CO denied certification because he concluded that the job was not open to any qualified U.S. worker since the Employer's documentation showed that the Alien was an officer, director and shareholder and it was unlikely that the Employer would replace him with a U.S. worker. (AF 7-8).

On June 2, 1989, the Employer filed its request for review, including oral argument (AF 2-5). Oral argument was denied by Order of December 27, 1989.

DISCUSSION

I.

Where an alien for whom labor certification is sought has an ownership interest in, or some other special relationship with, the sponsoring employer, the employer must demonstrate that a bona fide job opportunity exists for qualified U.S. applicants and that, if hired, the alien will not be self-employed. 20 CFR §§656.20(c)(8), 656.50.

The regulatory definition of "employment" found in Section 656.50 states: " 'Employment' means permanent full-time work by an employee for an employer other than oneself." Thus, if the alien or close family members have a substantial ownership interest in the sponsoring employer, the burden is on the employer to establish that employment of the alien is not tantamount to self-employment, and therefore a per se bar to labor certification. See Hall v. McLaughlin, 864 F.2d 868, 870 (D.C.Cir.1989); Modular Container Systems, Inc., 89-INA-228 (July 16, 1991) (en banc). The sponsoring employer can overcome this regulatory proscription if it can establish genuine independence and vitality not dependent on the alien's financial contribution. Modular Container, 89-INA-228.

In this instance the Alien does not have a substantial ownership interest in the sponsoring employer. HPM has 31 separately named shareholders including the Alien who owns only four percent of the corporation's stock. Though he is its Vice President for Finance and Marketing, and its Treasurer, as well as one of its directors, his level of financial interest is small, and there is no evidence of an inappropriately high salary or hidden bonuses or perks. Viewing all pertinent circumstances, we are persuaded that employment of the Alien is not tantamount to self-employment, and that such employment is not barred per se under Section 656.50.

II.

Although the employment is not barred per se as being merely self-employment, Section 656.20(c)(8) provides the additional requirement that the employer attest that the job opportunity has been and is clearly open to any qualified U.S. worker. Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity. Thus, an employer seeking labor certification for such an alien must not merely engage in a recruitment effort and show that no qualified U.S. worker is available; it must also establish that it has a bona fide job opportunity open to qualified U.S. workers. Modular Container, 89-INA-228.

Under Section 656.20(c)(8), the totality of the circumstances are examined to determine whether the job is clearly open to U.S. workers. Factors that may be examined include, but are not limited to, whether the alien:

- is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- is related to the corporate directors, officers, or employees;
- was an incorporator or founder of the company;
- has an ownership interest in the company;
- is involved in the management of the company;
- is on the board of directors;
- is one of a small number of employees;
- has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

The totality of the circumstances also include a general look at the employer's level of compliance and good faith in the processing of the claim. Id.; see also Malone & Associates, 90-INA-360 (May 16, 1991) (en banc). Further, the business cannot have been fraudulently established for the sole purpose of obtaining certification for the alien, i.e., a sham. Hall, 864 F.2d at 874.

III.

Dr. George V. Kondraske is an associate professor of electrical and biomedical engineering, and the Director, Human Performance Institute at the University of Texas in Arlington, Texas (UTA). Dr. Kondraske is the author and designer of the human performance measurement theory and technology which was jointly developed at UTA and UTA's Southwestern Medical School in Dallas under the auspices of CARE. He and Travis O. Harrell, formerly a staff engineer in UTA's department of electrical and biomedical engineering, formed the Humetrics Group, a general partnership, in June 1987. On September 1, 1987, Humetrics Group acquired a license for technology in the field of human performance measurement and assessment from UTA system's Board of Regents, an agency of the State of Texas (AF 19-26).

HPM, the Humetrics Group's successor, was incorporated September 28, 1987, and the license for the technology and all of its assets were assigned and transferred to HPM on January 6, 1988. Dr. Kondraske, Travis Harrell, James D. Runzheimer and the Alien constituted the initial Board of Directors (AF 13-14, 27). HPM was incorporated to sponsor further research and to develop and manufacture medical and industrial instrumentation for the measurement and assessment of the performance of various human bodily functions and is currently engaged in selling electronic equipment and computer hardware and software to the industry and academic researchers (AF 11, 49, 82).

IV.

The Alien was born in Hong Kong in 1961. He was awarded a bachelor's degree in electrical engineering and in commerce in June and October 1985, respectively, from Windsor University in Ontario, Canada. From September 1985, to May 1987, when he received his Master's in electrical engineering, he was a research assistant in UTA's department of electrical engineering. From September 1987 to May 1988, he was a technical staff assistant at UTA's Southwestern Medical School in Dallas. In May 1988, he began working for HPM. His work history shows that while employed he also worked on the technical staff of the Center for Advanced Rehabilitation Engineering (CARE) beginning in June and ending in August 1988. (AF 90-91).

There is no record of his activity between May and September 1987 and his relationship with HPM during that interval is unclear. However, he had completed his Master's degree in electrical engineering under the supervision of Dr. Kondraske.

Information from Dr. Kondraske shows that the Alien's Master's thesis "explored applications of my theoretical research in human performance measurement to digital system design." (AF 67), and the Alien's work at UTA's medical center involved software development and hardware design for custom software and medical equipment to personal computer interfaces (AF 68).

As noted above, the job opportunity requires a Master's degree in electrical engineering and six months experience in the job or a related occupation. The Alien has the required degree and by the time the job opening was advertised in August 1988, he had acquired eight months of qualifying experience at UTA's medical school.

V.

The facts of this case lead irresistibly to the conclusion that the Alien has a collegial and professional relationship with key members of the sponsoring employer. He is a stockholder, is on the Board of Directors, the Vice President for Finance and Marketing, and Treasurer. Moreover, his qualifications provide a remarkable match for the special qualifications of the position for which labor certification is sought.

Nevertheless, viewing the totality of the circumstances, we conclude HPM is offering a genuine job open to any qualified U.S. worker. With ownership of just four percent of HPM's stock among 30 other shareholders, it is unlikely that the Alien has a controlling say regarding the hiring of employees. Though the Alien has a collegial and close professional relationship with key company members, he has no familial relationship, and it is apparent from HPM's history that Dr. Kondraske and Messers Harrell and Runzheimer are the prime movers in its corporate affairs. The corporation exists and is an entity completely apart from the Alien. Moreover, there is nothing to show, and no reason to believe that the corporation was created to obtain the Alien's labor certification on his own behalf.

There is hardly any question that the requirements of the job match the Alien's qualifications. HPM concedes as much, and argues that members of Dr. Kondraske's original research team are the only ones qualified to apply for the position of human performance engineer. It points out that the Alien was instrumental in the development of its technology base and has a proprietary knowledge which is irreplaceable.

The CO did not question the existence of a job to be done nor did he find that the job offer was described with unduly restrictive requirements or that the Employer had trained the Alien for the position. The sole basis for his determination that the job is not open to a qualified U.S. worker is his conclusion that it is unlikely that HPM would replace the Alien because of his involvement in the corporation.

The job is unique because it involves new theory and new technology derived from original research. HPM was incorporated not only to market the product of that research, but, also, to add to that research. The job offer is part of the Alien's own making mostly for reasons of his graduate studies which he completed three months before HPM was organized. His six months experience required for the job was gained through eight months of employment with UTA's hospital in Dallas. Although the hospital and HPM were involved jointly in research, there is no evidence of the hospital acting as a front for HPM in employing the Alien or that HPM paid the Alien's wages. There is no evidence that the Alien acquired any of his qualifying experience through on-the-job training with HPM. He was not hired by HPM until a full year

after receiving his Master's degree in electrical engineering. HPM or its predecessor Humetrics had also been in existence for approximately one year before the Alien was hired.

The net result of the Alien's study, thought and experiment under the supervision of Dr. Kondraske and in his other work is that he partially contributed to and owns some of what he does as a human performance engineer. It goes without saying that when something new is brought into being the only ones who will have the experience with, and the knowledge of such development, are those who have confirmed the results through experiment and observation.

The facts establish that there is a genuine need for a human performance engineer which the CO did not question, and at this point it should be noted that notwithstanding the uniqueness of the job, that, as mentioned above, experience in a related field would have been acceptable by the Employer, but no U.S. worker applied. Therefore, it appears that the heart of this matter may not be so much the case of HPM attempting to circumvent any prohibitions as the fact that there may be insufficient members of the American work force who are prepared, trained and available to fill the job opportunities created by advancing technology. Under these particular circumstances, we conclude that there is a genuine job offer to any qualified worker, but there are no U.S. workers available who are qualified owing exclusively to the innate character of the duties and not to any action by HPM to design a job specifically for the Alien.

Under the circumstances labor certification should be granted. Owing to this conclusion, it is unnecessary to address the remaining issues raised in HPM's request for review.

ORDER

For the reasons discussed above the denial of certification is, hereby, reversed and the CO is ORDERED to grant certification.

AARON SILVERMAN
Administrative Law Judge

AS/trs

Guill, J., with whom Groner, Litt and Romano join, concurring.

The majority finds that "it is unlikely that the Alien has a controlling say regarding the hiring of employees" because he owns only four percent of Employer's stock and there are 30 other shareholders. As the record fails to disclose the amount of outstanding shares, and the record contains no evidence of the relative ownership interests of the other shareholders, I decline to infer, as likely as it may seem, that four percent ownership of the stock is insignificant. It could be the largest single holding of any of the 31 stockholders and potentially significant enough to permit control or influence over hiring decisions.

Nevertheless, in this instance the circumstances (stated in detail by the majority), together with Employer's apparent good faith compliance with the regulatory recruitment procedure, dispel any notion that a bona fide job opportunity does not exist. Specifically, Employer appropriately complied with the recruitment requirements, and the Alien did not have the opportunity to influence hiring as no U.S. workers applied for the job. Thus, any potential influence by the Alien lost much of its relevance. To hold that Employer cannot obtain labor certification in this case would be tantamount to a prohibition on certification whenever an alien has a favorable relationship with the sponsoring employer. Such a prohibition would be inconsistent with prior Board precedent, see, e.g., Paris Bakery, 88-INA-337 (Jan. 4, 1990) (en banc), and would go well beyond anything that Congress has legislated.